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No. 04-517

In the Supreme Court of the United States

CHRISTOPHER VILLAGE, L.P. AND WILSHIRE INVESTMENTS CORP., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit correctly concluded that a district court lacked jurisdiction under the Administrative Procedure Act over petitioners' claim for declaratory judgment against the Department of Housing and Urban Development (HUD), because a suit for money damages in the Court of Federal Claims provided an "adequate remedy," 5 U.S.C. 704.

2. Whether the United States Court of Appeals for the Federal Circuit erred in holding that, even if HUD breached its regulatory agreements and housing assistance payment contracts with petitioners, who then were the owners of a low-income housing project, that breach was excused by petitioners' prior material breach in submitting fraudulently inflated insurance expenses to HUD that incorporated illegal kickback payments.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. 1a-43a) is reported at 360 F.3d 1319. The opinion of the Court of Federal Claims granting summary judgment for the government (Pet. App. 116a-142a) is reported at 53 Fed. Cl. 182. The opinion of the Court of Federal Claims denying class certification (Pet. App. 88a-115a) is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 44a-72a) is reported at 190 F.3d 310. The opinion of the district court granting summary judgment for the Department of Housing and Urban Development is not published in the *Federal Supplement*, but is available at 1998 WL 422854.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2004. The petition for a writ of certiorari was filed on June 7, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1968, Congress amended the National Housing Act, 12 U.S.C. 1701 *et seq.*, to "assist private industry in providing housing for low and moderate income families and displaced families." 12 U.S.C. 1715*l*(a). Section 221 of the Act authorizes the Secretary of Housing and Urban Development (HUD) to insure mortgages made by private lenders to private developers or owners to build multifamily housing for low- and moderate-income tenants. See 12 U.S.C. 1715*l*(b) and (d)(3). If the owner of a property defaults, the holder of the mortgage is authorized to assign the loan to HUD in exchange for payment of FHA insurance benefits essentially in the amount of the loan. See 24 C.F.R. 207.255 *et seq.* In return for mortgage insurance, tax advantages, and various other benefits, owners of such properties agree to be "regulated or supervised * * * by the Secretary under a regulatory agreement or otherwise, as to rents, charges, and methods of operation, in such form and in such manner as in the opinion of the Secretary will effectuate the purposes of this section." 12 U.S.C. 1715*l*(d)(3). See Pet. App. 7a.

Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f, authorizes the Secretary to provide rental assistance to residents of privately owned multifamily housing projects. 42 U.S.C. 1437f. The Act also authorizes HUD (and local public housing agencies) to enter into agreements with landlords, known as Housing

Assistance Program contracts (HAP Contracts), to subsidize rental payments of tenants living in private, low-income housing. Under a HAP contract, landlords receive "assistance payments" in "an amount calculated to make up the difference between the tenant's contribution and a 'contract rent' agreed upon by the landlord and HUD." *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 12 (1993). See 42 U.S.C. 1437a(a). 2. Petitioners Christopher Village, L.P., and its managing general partner, Wilshire Investments Corp., owned a federally subsidized low-income housing complex known as Mockingbird Run Apartments (Mockingbird Run). Mockingbird Run was built in 1970 using an insured mortgage obtained under the National Housing Act. Petitioners entered into a standard regulatory agreement with HUD concerning Mockingbird Run (the Regulatory Agreement). See C.A. App. 2000-2005.[1] The Regulatory Agreement required petitioners to "maintain the mortgaged premises * * * in good repair and condition." *Id.* at 2002; see also 24 C.F.R. 221.530(b) (1995). The agreement also authorized HUD to regulate rents, and provided that the landlord could not increase the rent unless the increase was approved by HUD. C.A. App. 2001; see also 12 U.S.C. 1747c. The Regulatory Agreement specified that HUD-approved rent schedules were meant to "compensate for any net increase * * * in taxes (other than income taxes) and operating and maintenance expenses over which Owners have no effective control." C.A. App. 2001; 24 C.F.R. 886.112(b). The Regulatory Agreement also specified that "the Commissioner * * * will at any time entertain a written

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[1] References to "C.A. App." refer to the joint appendix in 02-5188, *Christopher Village, L.P.* v. *United States* (Fed. Cir.).

request for an increase [in rent] properly supported by substantiating evidence and within a reasonable time shall" approve or deny that request. C.A. App. 2001; see also 24 C.F.R. 886.112(c).

Petitioners also entered into a HAP Contract with HUD. See C.A. App. 2100-2107. Like the Regulatory Agreement, the HAP Contract regulated petitioners' management of Mockingbird Run, prohibiting them from charging more than specified rents and requiring them to "maintain and operate the contract units and related facilities so as to provide decent, safe and sanitary housing as defined by HUD." *Id.* at 2102.

3. During petitioners' ownership of Mockingbird Run, HUD physical inspections and management reviews consistently rated petitioners as unsatisfactory or below average, with few exceptions. See *Christopher Vill. Ltd. P'ship* v. *Cuomo*, No. CIV.A. H-95-5005, 1998 WL 422854, at *4 (S.D. Tex. Mar. 2, 1998). Physical inspections by HUD and the mortgagee rated Mockingbird Run unsatisfactory or below average every year from 1983-1995 except for 1987-1988, and HUD Management Reviews rated the property below average or unsatisfactory in maintenance for all years except 1985 and 1988. Consequently, there were a substantial number of vacancies, reducing the total amount of rents. *Ibid.* In an effort to improve the condition of the project, HUD provided "unusual" subsidy grants to petitioners (*ibid.*), and consistently granted them rent increases that exceeded the rate of inflation. *Ibid.*; see *id.* at *27, *29. For example, HUD granted petitioners rent increases of 10.4% in 1990; 12% in 1993; and 7% in 1994. Pet. App. 67a n.11. In 1996, Mockingbird Run's property manager represented that HUD-provided

funds were sufficient to maintain the property properly. 1998 WL 422854, at *4.

Nevertheless, by 1995, the physical condition of Mockingbird Run had deteriorated to the point that it required approximately $2 million worth of repairs. Pet. App. 9a; 1998 WL 422854, at *5. HUD concluded that petitioners had allowed the complex to deteriorate in violation of the Regulatory Agreement and the HAP Contract, and informed them in April 1995 that their failure to refurbish the property could lead to a default of the Regulatory Agreement and loss of the HAP Contract rent subsidies if the condition of the property were not brought up to the contractual standards. Pet. App. 9a.

On June 23, 1995, petitioners requested a 29% rent increase from HUD, claiming that the current rent revenue was inadequate to cover operating costs as well as maintenance and repairs. Pet. App. 9a. HUD sent petitioners a letter on August 25, 1995, explaining that the Regulatory Agreement and HAP Contract imposed an obligation on petitioners to maintain the property. The letter did not decide petitioners' rent increase request, but it instead required them to deposit approximately $2 million in escrow to fund Mockingbird Run's needed repairs. Petitioners did not deposit the $2 million. On September 6, 1995, HUD sent petitioners a second letter reiterating that it would not approve a rent increase unless they deposited the $2 million in escrow. *Id.* at 9a-10a. Petitioners again refused to pay the money, and on September 14, 1995, HUD informed petitioners that they "had violated * * * the Regulatory Agreement by not maintaining the mortgaged premises in good repair and condition [and that] HUD would proceed without further notice to take whatever reme-

dies are appropriate." *Id.* at 54a. In late November, HUD offered to perform the repairs itself and allow petitioners to regain possession of the property if petitioners would repay the cost of repairs. 1988 WL 422854, at *6. Petitioners declined.

On November 17, 1995, the original lender assigned the note and mortgage to HUD, and on December 1, "HUD assumed control of the property as a mortgagee in possession." Pet. App. 10a. Finally, on December 15, 1995, HUD sent petitioners a final letter reiterating the reasons for denying their proposal of funding repairs through rent increases, indicating that the rent increase request would be denied because it was based on increases in capital costs that were not permissible expenses under the Regulatory Agreement. 1998 WL 422854, at *4, *6.

4. In October 1995, while negotiations between petitioners and HUD were ongoing, petitioners brought suit against HUD in the United States District Court for the Southern District of Texas, seeking mandamus, injunctive and declaratory relief under the Administrative Procedure Act (APA), 5 U.S.C. 706, and 28 U.S.C. 2201 and 2202. Petitioners argued that HUD had illegally demanded $2 million in escrow and illegally refused to consider the request for a rent increase, and sought mandamus and injunctive relief to prevent HUD from foreclosing on Mockingbird Run. Petitioners also sought a declaratory judgment that their obligation to maintain the property was contingent upon receiving adequate rent revenue and that they were under no duty to make repairs unless they received adequate rent increases. In March of 1998, the district court granted summary judgment in favor of HUD on all counts, holding that HUD's decisions whether to grant rent

increases were unreviewable and that, even if HUD's actions were reviewable, "HUD's rejections of the owners' proposed rent increase * * * as well as its declaration of default, were not arbitrary, capricious, or an abuse of discretion." 1998 WL 422854, at *34. The court also concluded that "HUD has correctly interpreted the Regulatory Agreement and HAP Contracts in determining that the owners' absolute obligation to maintain the Property in good condition * * * is not conditioned upon the owners' right to receive rents that cover operating costs and maintenance expenses." *Ibid*

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. While the case was pending, HUD arranged to sell the property at a foreclosure sale. Pet. App. 55a. Both the district court and the court of appeals denied petitioners' motion to stay the sale, and Mockingbird Run was sold. *Ibid.* HUD bought the property at auction and sold it to the Housing Authority of the City of Bryan, Texas, which then razed it. *Ibid.*; *id.* at 11a.

5. The Fifth Circuit dismissed the appeal as moot in part, affirmed in part, and reversed in part. Pet. App. 44a-72a. The court held that "[t]he foreclosure sale and transfer to the city of Bryan effectively mooted [petitioners'] request for an injunction and mandamus because of this court's inability to fashion adequate relief" after the property had been sold. *Id.* at 57a-58a. The court nonetheless held that the request for declaratory judgment "continue[d] to present a live dispute" because "[a] declaration that HUD violated its regulations and contracts grants [petitioners] adequate relief because * * * [petitioners] could use the declaration as a predicate for a damages action against HUD in the Court of Federal Claims." *Id.* at 58a.

On the merits, the Fifth Circuit agreed with the district court that HUD decisions regarding requests for rent increases were "unreviewable" under the APA because "circuit courts have unanimously agreed that * * * Congress committed to HUD full discretion in determining whether to grant or deny a rent increase request." Pet. App. 59a. However, the Fifth Circuit concluded that the Regulatory Agreement and HUD regulations "require HUD at least to entertain a rent increase request." *Id.* at 61a; 24 C.F.R. 886.312(b). The court concluded that "HUD acted arbitrarily and capriciously when it refused * * * to consider a rental increase request from a non-negligent owner and instead demanded a $2 million cash infusion." Pet. App. 70a. The court emphasized that while "HUD could understandably refuse to provide financial assistance to an owner that has misappropriated funds [or] mismanaged the property," there was no evidence that that had occurred. *Id.* at 65a-66a. The court then remanded to permit the district court to "issue [petitioners'] requested declaratory judgment consistent with this opinion." *Id.* at 72a. There is no indication, however, that petitioners sought the entry of a declaratory judgment from the district court. *Id.* at 13a.

6. a. On September 21, 1999—less than a week after the Fifth Circuit's ruling—petitioners filed suit in the Court of Federal Claims. C.A. App. 3. The complaint alleged that they were entitled to the payment of damages because HUD had breached its contracts with petitioners and violated governing regulations and statutes. *Id.* at 3018, 3020. Petitioners also sought certification of a class of similarly-situated property owners. Pet. App. 13a. On October 26, 2001, the Court of Federal Claims denied class certification. *Ibid.*

b. While the damages action was pending, one of the limited partners of petitioner Christopher Village, Pet. App. 14a, 39a, the Management Assistance Group, Inc. (MAGI), a company that "had the same president, the same sole director, and the same sole shareholder" as petitioner Wilshire, *id.* at 39a; *id.* at 14a, pleaded guilty to engaging in an illegal insurance kickback scheme involving Mockingbird Run and other HUD projects. *Id.* at 15a, 128a-131a.[2] Under that scheme, MAGI defrauded HUD of several million dollars "by requiring the insurance broker to pay a kickback to retain MAGI's business." *Id.* at 130a; C.A. App. 2351 (plea agreement). The insurance company then recovered the cost of the kickbacks by "inflat[ing] the true cost of insurance for * * * HUD-project properties, and * * * invoic[ing] MAGI's affiliated properties, including Mockingbird Run, for the kickback costs as well as the actual insurance costs." Pet. App. 15a. Petitioner "Wilshire (on behalf of [petitioner] Christopher Village) * * * [then] billed HUD for [those] insurance payments that included * * * illegal kickback payments." *Id.* at 130a. "These inflated insurance charges were then included as an expense item in documentation that [petitioners] subsequently submitted to HUD in 1992, 1994, and 1995 in order to justify rent increase requests for Mockingbird Run." *Id.* at 15a; *id.* at 130a. In connection with

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[2] Although petitioners Wilshire and Christopher Village were not parties to the plea agreement, Wilshire was a party to a related consent judgment and administrative agreement, which were incorporated into the plea agreement. As part of the consent judgment and administrative agreement, the government agreed to release monetary claims against various affiliates, including petitioner Wilshire, in exchange for a payment of $8.125 million, representing "alleged damages arising from the scheme." Pet. App. 131a.

those rent increases, petitioners certified the reasonableness of all expenses. *Id.* at 15a-16a; *id.* at 130a.

The Regulatory Agreement prohibited disbursing project funds for anything other than "reasonable operating expenses and necessary repairs," Pet. App. 137a, and specified that violation of any of its provisions could result in a declaration of default and foreclosure of the mortgage. C.A. App. 2003. Similarly, the HAP Contract provided that HUD could consider the owner in default when the owner failed to comply with a contract provision or a HUD regulation, furnished false statements, or made false representations in connection with the administration of the contract. *Id.* at 2104.

c. On cross-motions for summary judgment, the Court of Federal Claims entered summary judgment in favor of HUD. Pet. App. 16a. Petitioners contended that they were entitled to a finding of liability against HUD as a matter of law because the Fifth Circuit's ruling barred the government from relitigating the issue of breach of contract under the doctrine of res judicata. *Ibid.* The government claimed that the MAGI plea evidenced a prior material breach by petitioners, thereby excusing the government from liability for any later breach that HUD may have committed by allegedly refusing to consider the rent-increase requests.

The court concluded that neither res judicata nor collateral estoppel prohibited it from considering the government's prior breach defense. The court explained that "[r]es judicata presumes that the first court had jurisdiction over the claim" but the "Fifth Circuit clearly recognized that it was up to this court to rule on the contract question, using as a 'predicate' its finding that a breach had occurred when HUD failed to consider [petitioners'] rent increase requests." Pet. App. 134a-

135a. The court concluded that "[a]lthough collateral estoppel bars the government from challenging [the Fifth Circuit's finding of] HUD's breach, collateral estoppel does not bar the government from defending that breach based on prior material breach" because the fraud was not known to HUD at the time and was not litigated in the Fifth Circuit. *Id.* at 136a. The court concluded that the "conduct of MAGI and Wilshire, in connection with the rent requests for the Mockingbird Run Apartments, constitutes a prior material breach of the HUD contracts which justifies HUD's termination of [petitioners'] contract for default." *Id.* at 139a.

7. The Court of Appeals for the Federal Circuit affirmed. Pet. App. 1a-43a. The court first concluded that the Fifth Circuit judgment was not entitled to res judicata effect because the district court (and, thus, the court of appeals, see 28 U.S.C. 1291) no longer had jurisdiction over the suit under the Administrative Procedure Act once the claims for injunctive relief became moot after Mockingbird Run was sold and razed. Pet. App. 17a-24a. The APA, the court noted, permits a plaintiff to challenge agency action when a suit calls for "relief other than money damages," *id.* at 19a (quoting 5 U.S.C. 702), but only if "there is *no other adequate remedy*." *Ibid.* (quoting 5 U.S.C. 704). "This limits the government's waiver of sovereign immunity to situations in which 'no other adequate remedy' exists." *Ibid.* (quoting *Bowen* v. *Massachusetts*, 487 U.S. 879, 902 (1988)). While "there is no question" that the district court "properly had jurisdiction over the original action to enjoin foreclosure by the government," *id.* at 19a, the court concluded that once the injunctive claim became moot, petitioners' "sole claim was for a declaratory judgment as to the legality of HUD's actions." *Id.*

at 20a. The court then concluded that a "suit in the Court of Federal Claims for money damages constituted an 'adequate remedy'" for the claims brought in the declaratory judgment action. *Ibid.* The Federal Circuit thus concluded that the district court (and the Fifth Circuit) "lacked jurisdiction over the action for declaratory judgment because the APA did not waive the United States' sovereign immunity for such a suit in district courts." *Id.* at 24a.

The Federal Circuit noted that while a court's lack of "jurisdiction over a suit in which it issued a decision does not automatically strip that decision of preclusive effect," Pet. App. 25a, there is a well-established exception to that rule that applies when giving preclusive effect to a judgment would "infringe the authority of another tribunal or agency of government." *Ibid.* (quoting Restatement (Second) of Judgments § 12 (1982)). The court of appeals reviewed decisions of this Court and the courts of appeals indicating that courts are not bound by a prior decision when the issuing court's lack of jurisdiction "directly implicat[es] issues of sovereign immunity." *Id.* at 30a (quoting *International Air Response* v. *United States*, 324 F.3d 1376, 1380 (Fed. Cir. 2003) (alteration in original)). The court noted that in both *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) (*U.S. Fidelity*), and *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940), this Court refused to give preclusive effect to decisions of courts that lacked jurisdiction over claims.[3] In light

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[3] "In *Kalb*, a state court had exercised jurisdiction over a foreclosure action, even though federal bankruptcy law vested exclusive jurisdiction in the federal courts. In *U.S. Fidelity*, a federal court had issued a judgment requiring certain Indian Nations to pay monies on disputed bonds, in contravention of their sovereign immunity. In both cases, the

of "the importance that Congress ascribed to the exclusive nature" (Pet. App. 30a) of the Court of Federal Claims' jurisdiction over contract-based claims for money damages against the United States for more than $10,000, *id.* at 31a-32a, the court concluded that the Fifth Circuit's exercise of jurisdiction in this case "directly implicat[ed] issues of sovereign immunity." *Id.* at 33a. Accordingly, it concluded that the Fifth Circuit's decision "is not entitled to preclusive effect." *Ibid.*

The Federal Circuit then held that the Court of Federal Claims properly granted the government summary judgment. Pet. App. 33a-41a. The court concluded that "[i]t is * * * clear that [petitioners] violated both the Regulatory Agreement and the HAP Contract by submitting * * * inflated rent increase requests" that incorporated the cost of kickbacks, *id.* at 36a, and that the MAGI-directed fraud against HUD constituted a prior material breach justifying the government's foreclosure. *Id.* at 42a-43a.

ARGUMENT

Petitioners contend that the decision of the Federal Circuit improperly prevents property owners from seeking injunctive or declaratory relief against HUD in district courts and thereby makes it impossible for them to "obtain judicial review of illegal action by HUD," Pet. 16, "infringes the authority" of other courts, Pet. 17, and creates "confusion" among the lower courts. Pet. 22. Those arguments lack merit. The Federal Circuit applied well-established principles to conclude that a suit for money damages in the Court of Federal Claims

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Supreme Court refused to give the judgments preclusive effect in subsequent suits." *Blinder, Robinson & Co.* v. *SEC*, 837 F.2d 1099, 1104 n.5 (D.C. Cir.), cert. denied, 488 U.S. 869 (1988).

provided an "adequate remedy" for petitioners' claim for declaratory relief after their claim for injunctive relief became moot, and that accordingly, the district court lacked jurisdiction over that claim under Section 704 of the APA. That decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. To begin with, even if petitioners were correct that the Fifth Circuit properly exercised jurisdiction over petitioners' declaratory judgment action, it would not affect the judgment in this case, which rests on the independent ground that MAGI's fraud on HUD constituted a prior material breach that justified foreclosure. While the Federal Circuit declined to give preclusive effect to the Fifth Circuit's conclusion that HUD had breached the contracts, Pet. App. 33a, it held that *even assuming a government breach*, the government was not liable because of petitioners' prior material breach. *Id.* at 33a, 37a; see also *id.* at 134a-136a.

That conclusion was correct. It has long been established that "relief will be granted against judgments regardless of the term of their entry" in cases involving "after-discovered fraud." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944); see *Bell* v. *City of Milwaukee*, 746 F.2d 1205, 1227 (7th Cir. 1984); *McCarty* v. *First of Ga. Ins. Co.*, 713 F.2d 609, 612-613 (10th Cir. 1983); cf. generally Restatement (Second) of Judgments § 26, cmt. j (1982) (exception to res judicata where one litigant concealed evidence "on a part or phase of a claim that the [other litigant] failed to include in an earlier action"). That exception is clearly applicable here, because the Fifth Circuit indicated that knowledge of such activities would have affected its decision. The Fifth Circuit explicitly predicated its

conclusion that "HUD acted arbitrarily and capriciously when it refused * * * to consider a rental increase request from a non-negligent owner," Pet. App. 70a, on the assumption that misconduct was "absent." *Id.* at 65a. The Fifth Circuit clearly stated that "HUD could understandably refuse to provide financial assistance to an owner that has misappropriated funds." *Ibid.*

Before this Court, petitioners do not challenge the finding of prior material breach. Thus, even if petitioners were correct that the Fifth Circuit had jurisdiction over their declaratory judgment claims, it would not affect the judgment of the Federal Circuit. Accordingly, review should be denied. See generally *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").

2. Petitioners contend (Pet. 16-18) that the Federal Circuit erred in concluding that, after HUD foreclosed on Mockingbird Run and the property was razed, a suit for damages in the Court of Federal Claims was "an adequate remedy" for their claims for purposes of 5 U.S.C. 704, and the district court therefore lacked jurisdiction over their declaratory judgment action under the Administrative Procedure Act. Petitioners' contention is meritless.

The APA waives sovereign immunity for suits to "set aside agency action * * * found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(a), when the suit calls for "relief other than money damages." 5 U.S.C. 702. The scope of the APA is limited, however, to instances in which "there is no other adequate remedy." 5 U.S.C. 704. As the courts of appeals have consistently concluded, Section 704 "has been interpreted to pre-

clude review under the APA when a plaintiff has an adequate remedy by suit under the Tucker Act" in the Court of Federal Claims. *Randall* v. *United States*, 95 F.3d 339, 346 (4th Cir. 1996), cert. denied, 519 U.S. 1150 (1997).[4]

Petitioners do not dispute those principles, but simply contend that the Court of Federal Claims misapplied them to the facts of this case. After the foreclosure and sale of the property and its razing by the new owners, however, petitioners' claims for injunctive relief became moot and their "sole claim was for a declaratory judgment as to the legality of HUD's actions." Pet. App. 20a. Because petitioners concededly could no longer be given possession of the project, *id.* at 57a-58a, this was not a case "where the monetary relief sought implicated the potential for prospective relief as well." *Id.* at 22a n.2. Thus the only apparent remedy at issue was "money in compensation for the losses [they] * * * ha[d] suffered."[5] *Bowen* v. *Massachusetts*, 487 U.S. 879, 895

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[4] Accord, *e.g.*, *Deaf Smith County Grain Processors, Inc.* v. *Glickman*, 162 F.3d 1206, 1210-1211 (D.C. Cir. 1998) (stating that "an 'adequate remedy' in the Claims Court * * * would preclude district court jurisdiction under § 704 of the APA"); *Marshall Leasing, Inc.* v. *United States*, 893 F.2d 1096, 1099 (9th Cir. 1990) ("A party may not avoid the [Court of Federal Claims'] jurisdiction by framing an action against the federal government that appears to seek only equitable relief when the party's real effort is to obtain damages in excess of $10,000."); *Rogers* v. *Ink*, 766 F.2d 430, 434 (10th Cir. 1985) ("A party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States.").

[5] Petitioners appear to suggest (Pet. 20-21, 22-23) that their claims for injunctive relief were not moot even after Mockingbird Run was sold in foreclosure and razed by its new owner. After the Fifth Circuit

(1988). Significantly, a principal focus of petitioners' claims was HUD's alleged breach of provisions of the Regulatory Agreement and HAP Contract. See Pet. App. 61a-62a (analyzing HUD's obligations under the contracts). Moreover, the *only* basis for the Fifth Circuit's conclusion that petitioners' declaratory judgment claim was not moot was that petitioners "could use the declaration *as a predicate for a damages action against HUD in the Court of Federal Claims.*" *Id.* at 58a (emphasis added). Petitioners' claim that a cause of action for money damages was an inadequate remedy is belied by their own actions: rather than returning to the district court to seek entry of a declaratory judgment after the Fifth Circuit's decision, see *id.* at 13a, petitioners instead filed suit for money damages in the Court of Federal Claims *less than a week later.* Under the circumstances, the Federal Circuit correctly concluded that because "the substance of the complaint[] at issue is a claim for money damages, [the] case is not one covered by section 702, and * * * the APA does not afford jurisdiction." *Id.* at 24a (quoting *Drake* v. *Panama Canal Comm'n*, 907 F.2d 532, 535 (5th Cir. 1990)).[6]

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held that those claims were moot, however, petitioners did not seek review of that decision. Accordingly, those claims are not properly before this Court.

[6] It is clear from the record that suit in the Court of Federal Claims afforded petitioners an adequate remedy. In the Court of Federal Claims, petitioners' complaint alleged that they had agreements with HUD requiring the payment of "adequate rents" (the Regulatory Agreement and the HAP Contract); that HUD had breached the agreements; that HUD's failure to do so had injured petitioners monetarily in the form of excessive costs, lost tax benefits and other losses of income; and that petitioners were entitled to monetary compensation for these injuries. C.A. App. 3018-3020. Petitioners have

Petitioners err in contending (Pet. 15) that "[t]he Federal Circuit ruled that the Fifth Circuit and the * * * District Court * * * had no jurisdiction to review agency action or to enjoin HUD from taking the property of an owner." See *ibid.* ("The Federal Circuit held that Christopher Village could bring no action to save its property."); Pet. 17 ("The Federal Circuit's decision totally forecloses the possibility of anyone seeking equitable relief to prevent the Government from breaching a contract."); Pet. 29 ("According to the Federal Circuit, a plaintiff cannot attempt to save its property by filing an action for equitable and declaratory relief in a district court."). The Federal Circuit explicitly held that the district court "properly had jurisdiction over the original action to enjoin foreclosure by the government" when the suit was first commenced, because "the necessary waiver of sovereign immunity existed as to the * * * claim for injunctive relief because no other adequate remedy existed to prevent the foreclosure and sale" of Mockingbird Run. Pet. App. 19a. The court also stated that "jurisdiction is only exclusive [in the Court

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not explained how recovery in this suit would not have afforded them a complete remedy for the claims still available to them.

Transohio Savings Bank v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992), cited by petitioners, see Pet. 29-30, is not to the contrary. The court of appeals in that case found that "the 'adequate remedy' limitation on the APA's waiver of sovereign immunity does not interfere with district court jurisdiction over Transohio's claims," 967 F.2d at 608, because the plaintiff there still had live claims for "equitable relief," namely "specific performance [and] rescission," that a suit in the Court of Claims could not provide. *Ibid.* The federal defendant in that case "appear[ed] to concede" that the case did not involve a claim for money damages, *ibid.*, and indeed, the court noted that success on the merits would "probably involve Transohio *returning* * * * millions of dollars" to the Treasury. *Ibid.* (emphasis added).

of Federal Claims] *if the Court of Federal Claims can award full relief.* The jurisdiction is not exclusive where '§ 702 of the APA is construed to authorize a district court to grant monetary relief' as part of broader relief." *Id.* at 32a n.6 (quoting *Bowen*, 487 U.S. at 910 n.48) (emphasis added). Petitioners are therefore wrong to contend (Pet. 16) that "none of the owners of the more than 3 million HUD assisted apartment units in the United States will be able to obtain judicial review of illegal action by HUD." The Federal Circuit held only that, under the facts of petitioners' case, petitioners' "sole claim" (Pet. App. 20a) was a request for a declaratory judgment, and their only viable action was for damages to compensate petitioners for HUD's actions with respect to the property. There is no need to revisit that factbound determination.

Petitioners contend (Pet. 17), without explanation, that the Federal Circuit's holding that a cause of action for money damages was an "adequate remedy" in this case under Section 704 of the APA "rewrote the jurisprudence pertaining to declaratory judgments and, in the process, overruled *Duke Power [Co.]* v. *[Carolina] Environmental Study Group*, 438 U.S. 59, 70-71 (1978), and *Powell* v. *McCormack*, 395 U.S. 486, 517-518 (1969)." There is no inconsistency between the decision below and either of those cases. *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978), held, in relevant part, that a district court had jurisdiction under the Declaratory Judgment Act to entertain a suit brought by an environmental group against a nuclear plant's owners challenging the constitutionality of a cap on liability for nuclear accidents imposed by the Price-Anderson Act, Pub. L. No. 85-256, § 4, 71 Stat. 576 (42 U.S.C. 2210). See 438 U.S. at 68-72. The Court rea-

soned that a district court did not need to determine whether the claim was one on which the plaintiffs "could actually recover," and that it was enough that the cause of action was not "*so patently without merit* as to justify . . . the court's dismissal for want of jurisdiction." *Id.* at 70 (quoting *Hagans* v. *Lavine*, 415 U.S. 528, 542-543 (1974)). In a footnote, the Court stated that the plaintiffs' claim did not seek "compensation for a taking" that could be remedied in the Court of Federal Claims, but a declaration that the Price-Anderson Act was unconstitutional because it "does not provide advance assurance of adequate compensation in the event of a taking." *Id.* at 71 n.15. But the Court's conclusion (which was premised on the claim that the statutorily provided compensation mechanism was inadequate) is in no way undermined by the Federal Circuit's conclusion that on the vastly different facts of this case—where the Fifth Circuit has indicated that the prospect of a suit for money damages is the only basis for finding the declaratory judgment action not to be moot, and petitioners themselves have brought a claim for damages before even finalizing the declaratory judgment—a cause of action for money damages was an adequate remedy.

Powell v. *McCormack*, 395 U.S. 486 (1969), is likewise inapposite. That case involved the justiciability of a challenge brought by a duly-elected member of Congress to the House of Representatives' refusal to seat him. *Id.* at 516-549. While the Court stated in passing that "a request for declaratory relief may be considered independently of whether other forms of relief are appropriate," *id.* at 518, that case, unlike this one, did not involve a claim over which another court had exclusive jurisdiction.

3. There is no merit to petitioners' claim (Pet. 17) that the Federal Circuit has improperly "confer[red] upon itself a role exclusively [belonging to] this Court: to review decisions of the courts of appeal[s]." The Federal Circuit did not purport to overturn the judgment in the Fifth Circuit in the sense that a reversal by a reviewing court would. Rather, the Federal Circuit simply determined the collateral estoppel effect to be afforded the Fifth Circuit's determination that HUD had breached its contracts with petitioners. That is a role that courts traditionally perform when a party asserts res judicata or collateral estoppel based on a judgment in another court. As the Federal Circuit correctly noted (Pet. App. 25a), a party generally cannot avoid the res judicata effects of a prior judgment on the grounds that the prior judgment was rendered by a court that lacked subject matter jurisdiction, even if jurisdiction is not litigated in the first action. See, *e.g.*, *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982). There is a well-recognized exception, however, for circumstances in which giving preclusive effect to the prior judgment would "'substantially infringe[] on the authority of another tribunal or agency of government,' Restatement (Second) of Judgments § 12(2) (1982), or when it [would] improperly trench[] on sovereign immunity." *Blinder, Robinson & Co.* v. *SEC*, 837 F.2d 1099, 1104 (D.C. Cir.), cert. denied, 488 U.S. 869 (1988); accord *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 512-513 (1940) (holding that prior judgment was void because claims against the United States and Indian Nations "are justiciable only in those courts where Congress has consented to their consideration"); *Kalb* v. *Feuerstein*, 308 U.S. 433, 439-440 (1940) (holding

that prior state judgment was void because federal Bankruptcy Court had exclusive jurisdiction over the claim).[7] The Fifth Circuit itself recognized that its decision was not determinative of HUD's liability for breach of contract, noting that its judgment was only a "predicate" for action in the Court of Federal Claims. Pet. App. 58a. Petitioners do not explain how the Federal Circuit erred in applying that long-established principle to the facts of this case, and its decision does not conflict with any decision of another court of appeals.

4. Although petitioners contend (Pet. 22) that the Federal Circuit's decision will result in "confusion," they point to no decisions indicating the presence of confusion about the proper resolution of declaratory or injunctive claims against HUD, nor do they even specify the matters about which confusion allegedly exists. Petitioners err in suggesting (Pet. 14) that the Federal Circuit's decision below "conflicts directly" with the Fifth Circuit's decision. Although the Fifth Circuit briefly addressed whether HUD's action was unreviewable because the "agency action is committed to agency discretion by law," Pet. App. 59a (quoting 5 U.S.C. 701(a)(2)), the court did not address whether a suit in the Court of Federal Claims was an "adequate remedy" under Section 704 of the APA for any injury petitioners suffered. See *id.* at 58a-60a. It is well

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[7] Accord *United States* v. *County of Cook*, 167 F.3d 381, 390 (7th Cir.) (Easterbrook, J.) (noting that principle "permits the United States to ignore proceedings instituted against it in the wrong court" because such resulting judgments are void), cert. denied, 528 U.S. 1019 (1999); *Gonzales* v. *Parks*, 830 F.2d 1033, 1036 (9th Cir. 1987) ("A state court judgment entered in a case that falls within the federal courts' exclusive jurisdiction is subject to collateral attack in the federal courts.").

settled that cases in which a jurisdictional issue is not addressed do not serve as binding authority for the proposition that proper jurisdiction exists. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (quoting *Hagans*, 415 U.S. at 535 n.5) (alteration in original). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511 (1925).

Petitioners likewise err in contending (Pet. 17) that the decision of the Federal Circuit "undermines" the Fifth Circuit's decision in *United States* v. *Southland Management Corp.*, 326 F.3d 669 (2003). *Southland* involved an action brought in district court by the United States under the False Claims Act, 31 U.S.C. 3729, claiming that the owner of a dilapidated HUD-assisted property had violated the Act by falsely certifying that its property was decent, safe, and sanitary, in support of its request for Housing Assistance Program payments. 326 F.3d at 674. The court held that under the HAP Contract at issue in that case, the owners of the project remained entitled to housing assistance payments "until HUD * * * notifies the Owners that they have failed to take the necessary corrective action within the specified time period," which had not occurred in that case, and that therefore the owners had not sought payments to which they were not entitled. *Id.* at 676. The Fifth Circuit's decision in that case in no

way conflicts with the Federal Circuit's decision here.[8] The Federal Circuit did not hold that other courts of appeals could not *construe* HUD contracts regardless of the type of action that was at issue; it simply held that a property owner could not maintain a declaratory judgment action if, under the circumstances of the particular case, the action involved nothing more than a claim for money damages for which a suit in the Court of Federal Claims was an adequate remedy.[9]

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[8] Petitioners are mistaken in suggesting (Pet. 23-24, 27-28) that the decision of the Federal Circuit is somehow inconsistent with the district court's unpublished decision in *Nail* v. *Martinez*, No. 3:02cv299BN (S.D. Miss. Dec. 2, 2002) (reproduced at C.A. App. 143-156). That case involved a housing project owner's suit under the APA to challenge his debarment for failing to maintain "decent, safe and sanitary condition[s]" at the projects he controlled. C.A. App. 145. The district court in that case addressed its jurisdiction over the claim only in a two-sentence footnote that did not discuss whether a suit in the Court of Federal Claims would provide the plaintiff there an adequate remedy. *Id.* at 154 n.2. In any event, the plaintiff in *Nail*, unlike petitioners, had a live equitable claim at the time of summary judgment, in that he sought injunctive relief to set aside the debarment order to which he was still subject. Because the Federal Circuit stated that the Court of Federal Claims does not have exclusive jurisdiction when it cannot "award full relief," Pet. App. 32a n.6, its decision below does not conflict with the district court's decision in *Nail*. Petitioners err in suggesting (Pet. 27-28) that the district court in *Nail* disagreed with the decision of the Court of Federal Claims in this case. The district court in *Nail* did not even mention the Court of Federal Claims' decision; the district court simply rejected the government's effort to distinguish the Fifth Circuit decision in *Christopher Village* on the facts because *Nail* did not involve a HUD failure to entertain a request for a rent increase. See *Nail*, slip op. 15 (reproduced at C.A. App. 153).

[9] There is no basis for petitioners' claims that HUD engaged in "[d]eceitful [c]onduct" (Pet. 25) and made "deliberate misrepresentation[s]" (Pet. 26) during the litigation in the district court and before the Fifth Circuit. Those claims are invalid. In any event, petitioners

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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fail to explain how the alleged acts of deceit in the Fifth Circuit litigation are legally relevant to the Federal Circuit's determination that the Fifth Circuit's decision was not entitled to res judicata effect, or that even if it were a valid judgment, it did not preclude the Court of Federal Claims from concluding that the fraudulent kickback scheme conducted respecting Mockingbird Run constituted a prior material breach that was a defense to petitioners' action.